APPENDIX A — OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED AND FILED NOVEMBER 1, 1999

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 97-5715

DANIEL C. MOTLEY,

Appellant

v.

NEW JERSEY STATE POLICE;
THE STATE TROOPERS FRATERNAL
ASSOCIATION OF NEW JERSEY

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF NEW JERSEY

(D.C. No. 96-cv-00419)
District Judge: Dickinson R. Debevoise

ARGUED August 3, 1998

BEFORE: NYGAARD, ALITO, and RENDELL,
Circuit Judges.

(Filed November 1, 1999)

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Appendix A

OPINION OF THE COURT

NYGAARD, *Circuit Judge*.

Plaintiff Daniel C. Motley, a former New Jersey State Trooper, was seriously injured on the job. Although he continued working as a Detective for several years after the accident, Motley was denied promotions because he was unable to complete the required annual physical examination. Eventually, Motley voluntarily took an accidental disability retirement, which included enhanced pension benefits. Thereafter, Motley sued the New Jersey State Police and others who are not parties to this appeal, alleging that by refusing to promote him for failing to pass the physical exam, the State Police discriminated against him on the basis of a physical handicap in violation of the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq. ("ADA"), and the New Jersey Law Against Discrimination, N.J. Stat. Ann. § 10:5-1 et seq. ("NJLAD"). The District Court granted summary judgment to the State Police, ruling that Motley's prior admission of permanent and total disability during the disability application process judicially estopped him from asserting that he was qualified for the job he sought. We will affirm, not because he was estopped, but because Motley was simply not entitled to survive summary judgment in light of his prior assertions of total disability, and his failure to adequately reconcile his wholly inconsistent positions.

I.

The facts of this case are undisputed, unless otherwise noted. This case arises as a result of an incident in January

1990 in which Motley was seriously injured while on duty. In the course of a drug buy-bust operation, Motley sustained serious injuries to his knees, back, neck, shoulder, and left eye when the accused attempted to escape and dragged Motley approximately 150 feet with his car until crashing into a pole.

Motley had joined the police force in 1982, and was promoted to Detective II in 1989. Since 1988, the New Jersey State Police has required that its officers participate in an annual physical examination.[1] The rules provided that any officer who did not satisfactorily complete the physical examination would not be eligible for promotion.[2] As a result of the injuries sustained in the January 1990 incident, Motley was placed on temporary limited duty status.

Motley did not participate in the annual physical examination after he was injured in the 1990 incident. Between May 1990 and May 1991, Motley's performance

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1. The State Police justified this exam by noting that officers could be exposed to violent confrontations at any time, and that it was therefore necessary that the officers be physically able to respond to these situations to protect members of the public. This examination consisted of various physical activities. In addition to flexibility and body composition assessments, the officers were required to run 1.5 miles in 13 minutes, do 34 sit-ups in two minutes, and do 32 push-ups in two minutes. If an employee was unable to run, swimming or biking tests could be substituted.

2. The rules did not automatically exclude those officers who were suffering from temporary medical or physiological problems from consideration for promotion. Instead, the Police Superintendent considered their eligibility for promotion on a case-by-case basis.

was evaluated and he was not recommended for promotion to the rank of Detective I because he did not pass the fitness test. In August 1991, Motley filed a grievance claiming that he was entitled to the promotion because he had the requisite service time. Motley received no answer to his grievance, and he was subsequently not recommended for promotion in 1992 and 1993.

On April 7, 1993, Motley applied for an accidental disability pension. New Jersey law allows this benefit to be granted to a State Police officer provided that a medical board determines that the officer is "permanently and totally disabled . . . and . . . physically incapacitated for the performance of his usual duties" as a consequence of an event that occurred as a result of the officer's duties. N.J. Stat. Ann. § 53:5A-10(a). In his application, Motley declared that he was qualified for the enhanced disability pension benefits because he was "permanently and totally incapacitated" as a result of the January 1990 incident. The medical board concurred and found that Motley was permanently and totally incapacitated for "State Police Officer duties." The State Police did not challenge this determination. Thereafter, Motley's application for an accidental disability retirement pension was granted by the Division of Pensions, and Motley continues to receive monthly disability payments.

Motley commenced this action under the ADA and NJLAD. The District Court granted summary judgment to the State Police, ruling that Motley's prior assertion that he was totally and permanently disabled judicially estopped him from suing under the ADA and NJLAD because he could not demonstrate that he was otherwise qualified for the job.

Appendix A

II.

We have the opportunity in this case to address the effect of our prior holding in *McNemar*, 91 F.3d at 610. As we have previously noted, *McNemar* has generated a great deal of academic and judicial criticism. *See Krouse v. American Sterilizer Co.*, 126 F.3d 494, 502 n.3 (3d Cir. 1997) (citing the criticism). Much of the criticism is based on the mistaken belief that *McNemar* announced a per se rule that a claim for disability, based on an assertion of a total disability or inability to work, necessarily bars an individual from pursuing an ADA discrimination claim. *McNemar* announced no such per se rule.[3]

McNemar correctly declared that application of judicial estoppel requires that " 'each case be decided upon its own particular facts and circumstances.' " *McNemar*, 91 F.3d at 617 (quoting *Scarano v. Central R.R. Co.*, 203 F.2d 510, 513 (3d Cir. 1953)). We stated that the application should not be formulaic, but should follow the framework set out in our decisions, most notably in *Ryan Operations G.P. v.*

3. We previously noted this in dicta in *Krouse*. In *Krouse*, we stated that the district courts in this circuit "should not assume that *McNemar* always bars an individual's ADA claims merely because prior representations or determinations of disability exist on the record." *Krouse*, 126 F.3d at 503 n.5. The Eleventh Circuit Court of Appeals also took notice of the explanatory effect of the *Krouse* opinion when it stated that in light of *Krouse*'s discussion of *McNemar*, "it appears that no court of appeals has adopted the position that a plaintiff who has claimed total disability on a benefits application is per se estopped from claiming he could work with reasonable accommodations under the ADA." *Talavera v. School Bd. of Palm Beach County*, 129 F.3d 1214, 1218 (11th Cir. 1997).

Santiam-Midwest Lumber Co., 81 F.3d 355 (3d Cir. 1996). Looking at the framework developed by this court over time, we opined in *McNemar* that judicial estoppel may be invoked by a court at its discretion "to preserve the integrity of the judicial system by preventing parties from playing fast and loose with the courts in assuming inconsistent positions, and . . . with a recognition that *each case must be decided upon its own particular facts and circumstances*." *McNemar*, 91 F.3d at 617 (emphasis added).

We made clear in *Krouse* that "courts should carefully adhere to the two-part test of *Ryan Operations*" before applying judicial estoppel. *Krouse*, 126 F.3d at 503 n.5. The *Ryan Operations* analysis requires a district court to make a determination on two threshold questions before applying judicial estoppel. The questions are: (1) is the present position inconsistent with a position formerly asserted; and (2) if so, were either or both of the inconsistent positions asserted in bad faith with the intent to play "fast and loose with the court." *Ryan Operations*, 81 F.3d at 361; *see also McNemar*, 91 F.3d at 618. The District Court adhered to this framework when it analyzed the issues in this case. Following *Krouse*, the Supreme Court in *Cleveland v. Policy Management Sys. Corp.*, 119 S. Ct. 1597 (1999), explained how cases of this type should be handled, and it is that framework that we apply here.

A.

The first question we must address is whether the two positions taken by Motley are inconsistent. As the Supreme Court's recent decision in *Cleveland* makes clear, each case should be decided on its unique facts.

In *Cleveland*, the Supreme Court decided that the Fifth Circuit Court of Appeals erred when it held that receipt of Social Security Disability Insurance ("SSDI") benefits automatically created a rebuttable presumption that the recipient was estopped from pursuing an ADA claim. *See id.* at 1599-1600. The Court held that while no presumption should be applied, to survive summary judgment, an ADA plaintiff "cannot simply ignore her SSDI contention that she was too disabled to work. . . . [S]he must explain why that SSDI contention is consistent with her ADA claim that she could 'perform the essential functions' of her previous job, at least with 'reasonable accommodation.' " *Id.* at 1600.

The Supreme Court acknowledged, as do we, that a statement of total disability when applying for disability benefits may be a "context-related legal conclusion, namely 'I am disabled for purposes of the [disability act].' " *Id.* at 1601. The Court noted that there are situations in which a person may be disabled enough to qualify for receipt of disability benefits under SSDI, yet still be able to bring a cognizable ADA claim.[4] In large part, this is because, when determining whether to award SSDI benefits, the possibility of reasonable accommodation is not taken into account. Under the ADA, however, a "qualified individual" includes all people who "can perform the essential functions" of the job "with or without reasonable accommodation." 42 U.S.C. § 12111(8).

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4. To the extent that *McNemar* is unclear on this issue, we clarify today that, consistent with *Cleveland* and the rule that every case should be decided on its individual facts, there may be circumstances in which a party may pursue a successful ADA claim even after he has applied for disability benefits.

The Court also acknowledged that certain statements made during disability hearings may lead to generally applicable factual conclusions. Where factual inconsistencies between claims exist, as opposed to context-specific legal conclusions, the Court held that the law remains "where [it] found it." *See Cleveland*, 119 S. Ct. at 1601-02; *Mitchell v. Washingtonville Central School Dist.*, 190 F.3d 1, No. 98-7185, 1999 WL 627019, at *5-6 (2d Cir. Aug. 18, 1999) (publication page reference not available) (discussing *Cleveland* and holding that previous assertions made as part of disability claim that employee could not stand or walk were purely factual, so that "if the requirements for judicial estoppel are otherwise met, [the employee] may be prevented from claiming, as a factual matter, that he could [perform these physical activities] on the basis of prior factual assertions to the contrary.").

The Supreme Court recognized that, although no presumption against recovery in an ADA suit exists, "[n]ōnetheless, in some cases an earlier SSDI claim may turn out genuinely to conflict with an ADA claim." *Cleveland*, 119 S. Ct. at 1603. Recognizing the apparent contradiction that arises from an earlier application for disability benefits, the Court noted that the ADA plaintiff "must proffer a sufficient explanation" to resolve the contradiction. *Id.*

In *Cleveland*, the ADA plaintiff had proffered a sufficient explanation of the difference in her statements. First, Cleveland noted that her initial statements were "made in a forum that does not consider the effect that reasonable workplace accommodations would have on the ability to work." *Id.* at 1604. Obviously, this is true in all of these

cases and, if this argument alone allowed ADA plaintiffs who had previously applied for SSDI-type benefits to survive summary judgment, summary judgment could never be granted. Because the Supreme Court indicated that summary judgment would indeed be appropriate in some cases, an ADA plaintiff must, in certain circumstances, provide some additional rationale to explain the plaintiff's apparent about-face concerning the extent of the injuries. Considering the different contexts in which the two statutory regimes operate could, of course, be crucial to understanding how an ADA plaintiff's particular claims may be reconciled. The additional justification presented by the plaintiff could, in theory, go into detail regarding the facts of his or her case, demonstrating how the differing statutory contexts makes their statements made under one scheme reconcilable with their claims under the other. As discussed below, however, such consideration does not help Motley.

In *Cleveland*, the ADA plaintiff claimed that her statements were accurate "in the time period in which they were made." *Id.* So, in addition to noting that the statutory standards differed, Cleveland appears to have made a fact-based argument that her condition changed to some degree during the applicable time periods. This amounted to a sufficient explanation under the facts of Cleveland's case but, as we have said, each case must be decided on its unique facts. Although the presence of this additional justification distinguishes Cleveland's case from Motley's, this does not mean that Motley must demonstrate a change in his condition to avoid dismissal of his case. It does mean, however, that to avoid having his claim dismissed Motley's "explanation [of inconsistent positions] must be sufficient to warrant a

reasonable juror's concluding that, assuming the truth of or [his] good faith belief in the earlier statement, [he] could nonetheless perform the essential functions of [his] job, with or without reasonable accommodation." Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 2732.3 (West Supp. 1999) (discussing *Cleveland*). Motley has failed to provide such a sufficient explanation, even taking into account the different standards used in his disability hearing and under the ADA.

To establish that he was a "qualified individual with a disability" under the ADA and the comparable provisions of the NJLAD,[5] Motley must be able to demonstrate that he could perform the "essential functions" of a state trooper with or without reasonable accommodation. *See* 42 U.S.C. § 12111(8); *Gaul v. Lucent Techs., Inc.*, 134 F.3d 576, 579 (3d Cir. 1998). Therefore, it was the District Court's duty to decide whether Motley's earlier assertions when applying for disability benefits were inconsistent with this burden. After examining the specific facts of the case, the District Court found that Motley's present claim that he was able to

5. Although an ADA suit revolves around whether the plaintiff has a "disability," 42 U.S.C. § 12102(2)(A), the NJLAD refers to "handicapped" individuals. N.J.S.A. § 10:5-5(q). We have noted that the definitions of the two terms are different, most notably because the NJLAD definition of handicapped does not include the ADA's requirement that the condition substantially limit a major life activity. *See Failla v. City of Passaic*, 146 F.3d 149, 153-54 (3d Cir. 1998). We will concentrate on the ADA standard in our analysis because it is clear that if Motley's statements estopped him from claiming that he had a "disability" under the more stringent ADA standard, the statements would also estop him from claiming he was "handicapped" under the NJLAD.

perform the essential functions of his position with or without accommodation was "fundamentally inconsistent" with his earlier declaration that he was permanently and totally disabled and unable to work as a state police officer.

Although courts should not assume that an individual's ADA claim is barred "merely because prior representations or determinations of disability exist in the record," *Krouse*, 126 F.3d at 503 n.5, the attainment of disability benefits is certainly some evidence of an assertion that would be inconsistent with the argument that the party is a qualified individual under the ADA. Recognizing that this was the logical conclusion in these types of cases, the Supreme Court in *Cleveland* acknowledged that the ADA plaintiff must somehow explain the apparent inconsistency. Motley has failed to meet this burden.

In his application for disability benefits, Motley averred that he was "permanently and totally disabled" as a result of the events of January 1990. (SA 11, SA 13) It is difficult to get around the conclusion that, in at least one of the fora, Motley was not completely honest. The statutes under which Motley pursued his disability benefits claim allow a disability pension to be awarded to an officer who is "physically incapacitated for the performance of his usual duties in the Division of State Police." N.J. Stat. Ann. § 53:5A-10(a). Nowhere in his application for the disability pension is there any indication that Motley could perform the essential functions of a state trooper, with or without accommodation. "Employers . . . are not required to find another job for an employee who is not qualified for the job he or she was doing." *School Bd. of Nassau County v. Arline*, 480 U.S.

273, 289 n.19, 107 S. Ct. 1123 (1987). However, Motley did receive full pension benefits.

Rather than a general allegation of disability, Motley offered detailed descriptions of his injuries and their impact on his ability to work. He claimed that he had sustained several debilitating injuries to support his claim of physical incapacitation in his application for disability benefits. He stated that he had "extremely painful and recurring headaches" and "intense back pain" when he sat for more than 20 minutes. (SA 15) In addition, Motley claimed that he had difficulty sleeping more than two to three hours because of the back pain. Furthermore, he asserted that he had "extreme pain" in his left knee and could not stand on it without pain. He also claimed to have "extreme difficulty with running." (SA 15) To receive the disability pension, Motley had to undergo an examination by a medical board. This board concurred with Motley's assertion that he was "totally and permanently incapacitated for state police officer duties." (SA15) Neither Motley nor the State Police contested this finding, which presumably took the fundamental job requirements for state police officers, along with reasonable accommodations such as light duty, into consideration when it chose to grant Motley full pension benefits.

More important than the extent of Motley's injuries is his failure to proffer a reasonable explanation for his inconsistent statements. As we noted above, simply averring that the statutory schemes differ is not enough to survive summary judgment in light of *Cleveland*. An ADA plaintiff must offer a more substantial explanation to explain the divergent positions taken, or else summary judgment could

never be granted. Motley has failed to bring any additional reasons for his conflicting answers to our attention. If anything, looking to the different statutory schemes in this particular case convinces us that Motley's claims are, in fact, unreconcilable. The purpose of Motley's disability hearing was to determine whether he could continue to function as a state police officer. The resulting conclusion that he should be granted full pension benefits because his medical condition did not allow him to continue to serve is not one taken from some foreign context; it is directly relevant to Motley's claim that he was discriminated against when the New Jersey State Police failed to promote him. If Motley could not continue to serve because of his medical condition, it follows that he should not have been promoted for the same reason. Nonetheless, under *Cleveland*, we have given Motley an opportunity to explain how he can reconcile his two assertions. We do not believe the District Court erred by finding there is not sufficient evidence to allow a reasonable juror to do so.

As noted above, to the extent that Motley now wishes to contest the purely factual findings regarding his physical condition, as opposed to conclusions that he was completely disabled for purposes of working as a state police officer, *Cleveland* does not even apply and Motley may be precluded from asserting such a claim. *See Cleveland*, 119 S. Ct. at 1601-02; *Mitchell*, 190 F.3d at __, 1999 WL 627019, at *5-6.

Motley's decision to rely solely on the differences in the statutory schemes is thus fatal to his ADA and NJLAD claims under the circumstances. There is undeniably a

difference in the language of the various statutes; however, as *McNemar* indicated, focus on the differences in the statutory standards should not take precedence over a careful assessment of the nature of the prior assertions made by a party and their impact on the current claim.

As the Supreme Court made clear in *Cleveland*, 119 S. Ct. at 1603-04, the mere fact that the statutory standards differ in some aspects does not mean that a prior assertion of permanent and total disability can never preclude a party from bringing a claim under the ADA. *Cleveland* holds simply that where context-related legal conclusions are involved, courts must not apply presumptions automatically without first considering whether the ADA plaintiff can reconcile the two apparently inconsistent statutory claims. There may be cases where, looking at the previous facts and statements by a party, the assertions are such that the party cannot prove that he was a qualified individual because his previous statements take the position that he could not perform the essential functions of the job, with or without accommodation. That is the case here.

Motley, relying on several specific and severe physical injuries, asserted that he was "permanently and totally disabled." This was not a mere blanket statement of complete disability checked on a box in order to obtain pension benefits. Rather, the assertion was supported by Motley's additional statements concerning the type and extent of his injuries. Furthermore, the medical board diagnosis, uncontested by Motley, also concluded that Motley was permanently incapacitated for police officer duties. On their face, these assertions are patently inconsistent with his

present claims that he was a "qualified individual" under the ADA.

Motley asserted that he was totally disabled so that he could receive special retirement benefits. After his retirement, he brought this claim, which necessarily relies on the fact that he was not totally disabled. Examining all the facts, we cannot say that the District Court erred when it concluded that the ADA case brought by Motley was inconsistent with his earlier statements regarding his disability. Thus, under *Cleveland*, the entry of summary judgment against Motley was proper. Our decision is based squarely on the standard set out by the Supreme Court in *Cleveland*. The difference between our position and that of the dissent is simply the fact-bound question of whether, under that standard, Motley was entitled to survive summary judgment. We hold that he was not.

III.

Because we find that the District Court did not err when it granted summary judgment against Motley in light of his prior assertions of complete disability, we affirm.

Appendix A

RENDELL, *Circuit Judge*, dissenting:

I agree with the majority's view that *Cleveland v. Policy Management Sys. Corp.*, undercuts our previous decisions and replaces concepts of judicial estoppel and special legal presumptions with a straightforward test that is, in essence, nothing more than an application of normal summary judgment procedures when conflicting affidavits are presented in a case.[1] Now, a plaintiff must reconcile or explain away the apparent conflict.

In *Cleveland*, the Supreme Court gave Ms. Cleveland an opportunity to do so, remanding so "[t]he parties [would] have the opportunity in the trial court to present, or to contest, these explanations, in sworn form where appropriate." *Cleveland*, 119 S. Ct. 1597, 1604 (1999).[2] However, we have

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1. In *Cleveland*, the Supreme Court explained:

> When faced with a plaintiff's previous sworn statement asserting "total disability" or the like, the court should require an explanation of any apparent inconsistency with the necessary elements of an ADA claim. To defeat summary judgment, that explanation must be sufficient to warrant a reasonable juror's concluding that, assuming the truth of, or the plaintiff's good faith belief in, the earlier statement, the plaintiff could nonetheless "perform the essential functions" of her job, with or without "reasonable accommodations."

Cleveland, 119 S. Ct. at 1604.

2. Contrary to the majority's statement regarding the holding of *Cleveland*, the Supreme Court did not find her explanation "sufficient" to defeat a motion for summary judgment; rather, it remanded to test the sufficiency of the statement. *See Cleveland*, 119 S. Ct. at 1604.

denied Mr. Motley his day in court based on our view that he would not be able to satisfactorily explain away the inconsistency between his two statements.

I take issue with our ruling for two reasons:

First, I think that, after *Cleveland*, we should remand in cases such as this to provide all plaintiffs in Mr. Motley's position with the opportunity to explain away the inconsistency, if they can do so, and to be subject to cross examination, rather than reaching our own conclusions from the record.[3] The procedure set forth in *Cleveland* requires no less.

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3. In the post-*Cleveland* decision of *Mitchell v. Washingtonville Central School Dist.*, __ F.3d __, No. 98-7185, 1999 WL 627019 (2d Cir. Aug. 18, 1999) (to be reported at 190 F.3d 1), the Second Circuit came to its own conclusion regarding plaintiff's ability to perform the essential functions of a position with or without a reasonable accommodation. The plaintiff had previously stated that he could not engage in any gainful employment and, specifically, could not stand or ambulate for any prolonged period. The court, finding that standing and walking were essential functions of the position in question, and holding that the principles of judicial estoppel applied to those factual assertions, affirmed the district court's conclusion that the plaintiff could not establish a prima facie case. Our case is clearly distinguishable from Mitchell's. Here, the District Court's determination that Motley was judicially estopped rested solely upon Motley's legal conclusions rather than his factual assertions. Furthermore, courts should not use the disability description normally set forth in an application for benefits, without more, as a bar unless the result is clear. To do similarly deprives litigants any opportunity to explain.

Once the plaintiff has made an apparently inconsistent statement, the defendant challenges this contrary assertion as a defense, and in order to survive summary judgment, the plaintiff must come forward with an explanation. It is not for the court upon the defendant's raising of this inconsistency, to decide on its own whether the inconsistency can be reconciled. How can we, now, after *Cleveland*, deny this opportunity which is clearly mandated?

In *Cleveland*, the explanations offered in plaintiff's brief on appeal consisted not only of statutory differences, but also included an allegation that plaintiff's condition had improved over time so that the earlier statements were true when made. *See id.* Although this would seem to be a satisfactory explanation, the Supreme Court did not reverse outright, but, rather, remanded the case for determination as to the sufficiency of the explanation. *See id.* In doing so, it did no more than permit the normal procedure to unfold, that is, as it outlined in explaining the way these situations should be handled, plaintiff must be given the opportunity to explain away.

Here, we err not only in deciding the issue, but, even more, we err by deciding it based upon the record made when the rules of the game were very different. The District Court decided this issue in the context of a body of law that did not permit any explanation of the inconsistency, and certainly did not require the proffer of an explanation. In *McNemar v. Disney Store, Inc.*, this Court wrote: "McNemar's statements on his disability benefits application are unconditional assertions as to his disability; he should not now be permitted to qualify those statements where the application itself is

unequivocal." *McNemar v. Disney Store, Inc.*, 91 F.3d 610, 618 (3d Cir. 1996) (quoting *Smith v. Midland Brake, Inc.*, 911 F. Supp. 1351, 1358 (D. Kan. 1995) (internal quotations omitted).[4]

The District Court never considered any explanation, and the parties' discovery and arguments were clearly uninformed as to the need for an explanation. To now cull the existing

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4. I recognize that in *Krouse v. American Sterilizer Co.*, 726 F.3d 494, 503 n.5 (3d 1997) we subsequently explained that *McNemar* ought not be read as a per se bar of ADA claims. However, *McNemar*'s skepticism remained the law of this circuit until *Cleveland* and the District Court relied upon *McNemar* in its description of the law and its analysis of this case. The District Court wrote:

> Mr. Motley's assertions of permanent and total disability and inability to work are fundamentally inconsistent with his current position that at all material times with or without accommodation he was able to perform the essential functions of his position. Counsel for Mr. Motley noted both in the papers submitted and at oral argument of September 8, 1997 that he never specifically claimed to be disabled in August 1991 when he was to be considered for a promotion. However, his declaration that he is totally and permanently disabled include the August 1991 time period. In addition, he certified that he has not performed regular duty since the traumatic event. Accordingly, because Mr. Motley has asserted fundamentally inconsistent positions, the first part of the test for judicial estoppel is met.

Motley v. New Jersey State Police, No. 96-419, slip op. at 9 (E.D. Pa. Sept. 9, 1997).

record to make the argument, and resolve it in favor of the defendant under a new set of rules, is unfair. *See Rothberg v. Rosenbloom*, 771 F.2d 818, 824 (3d Cir. 1985); *see also U.S. v. Kikumura*, 918 F.2d 1084, 1103 n.23 (3d Cir. 1990). I would therefore remand for plaintiff to proffer his explanation, with the opportunity for the parties to offer evidence and cross-examine on this issue, as the Supreme Court did in *Cleveland*.[5]

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5. I note in passing that the majority opinion seems to equivocate somewhat with respect to the type of explanation that will suffice — whether statutory differences can be, in and of themselves, enough. While we do not clearly state that they can be, I think that *Cleveland* does so state, and I will construe the majority opinion to so provide. *See Cleveland*, 119 S. Ct. at 1604 (stating that the plaintiff raised the difference between the statutes and the accuracy of her statements at the times they were made as explanations and remanding for consideration of "these explanations"). Obviously, however, a statutory difference does not exist in the abstract. Rather, reliance on different standards as an explanation must be supported with relevant facts — for instance, if someone is disabled for purposes of a retirement disability pension because he cannot perform the "usual duties" that a superior would assign, he must explain how he could perform the "essential functions with accommodation," relating these differences to specific facts as to what he can and cannot do in connection with his employment, and how accommodation would make a difference in his job performance. As noted above, *Cleveland* states: "To defeat summary judgment, that explanation must be sufficient to warrant a reasonable juror's concluding that, assuming the truth of, or the plaintiff's good faith belief in, the earlier statement, the plaintiff could nonetheless 'perform the essential functions' of her job, with or without 'reasonable accommodations.' " *Cleveland*, 119 S. Ct. at 1604.

Second, I read the record here as not being nearly as one-sided as the majority views it, and I believe that there are, at least, genuine issues of fact regarding what Mr. Motley can and cannot do, and issues as to how his statements should be interpreted. The majority notes some of the record regarding Mr. Motley's situation, but there is much more. I believe the majority places too much weight on the findings of the medical board, ignores the questions raised by Motley's second benefits application, and, most importantly, fails to consider the factual record regarding the extent of his service and duties, after his injury, for which he received commendations.

It is clear from his work reviews, as it is from his amended application for benefits, that Motley had indeed been working consistently as a detective ever since his injury. In fact, Motley did so in superior fashion. He remained on full-duty for the purposes of his reviews, *see* PA 42, and received exemplary performance evaluations and several commendations. *See* PA 85-100.[6] Motley participated in

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6. For instance, from May 1, 1990 to October 31, 1990, Mr. Motley "functioned in an undercover capacity, a surface investigation and as part of a surveillance team operating in a primarily Hispanic neighborhood," and was "injected into emergent investigations involving lengthy and complicated affidavits for search warrants," which he prepared and executed. *See* PA 87-88. From November 1, 1990 to April 30, 1991, Mr. Motley was assigned to the Narcotics North Unit and the Patrol Response Unit, in both an undercover and surface investigative capacity. He received a commendation for his work with the Patrol Response Unit during this time period, for his participation in the seizure of $4.5 million. *See* PA 89. From May 1, 1991 to April 30, 1994, he was assigned to

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complex investigations requiring undercover work, expert surveillance, and execution of search warrants in potentially dangerous situations. *See id.* Unlike in *Mitchell v. Washingtonville Central School Dist.*, __ F.3d __, No. 98-7185, 1999 WL 627019 (2d Cir. Aug. 18, 1999) (to be reported at 190 F.3d 1), the record does not support the

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the newly created C.E.R.B. North Unit, Squad 2, where he investigated "diverse criminal cases," such as narcotics, loansharking, and racketeering, in both undercover and surface investigative capacities. *See* PA 91. During this time period, he received a Performance Notice commending him for his actions when he was confronted while working undercover by five subjects, two of them armed. *See* PA 94. He also received commendations for his participation in the installation of an electronic surveillance device, the arrest of members of a Jamaican Posse, and a joint investigation resulting in a major cocaine seizure. *See* PA 94, 96-97, 99.

Further, Mr. Motley's performance evaluations during the time period after he was injured were consistently positive. For instance, the evaluation report covering the time period from November 1, 1989 to April 1, 1990, concluded that Mr. Motley "perform[ed] his duties in an excellent and professional manner." PA 85. It also noted that "[h]e willingly accepts responsibilities and maintains a strong desire to produce a quality work product," and "exceeds in enthusiasm, has good initiative, is aggressive, professional and maintains an excellent spirit of cooperation with his peers and other law enforcement agencies concerned with narcotic enforcement." *Id.* Mr. Motley was also described in various evaluation reports spanning the time period from November 1, 1989 to April 30, 1994, as "very proficient," "very resourceful," "thoroughly knowledgeable," "a valuable asset," "a positive role model," "conscientious," "self-motivated," "perform[ing] well under stressful situations," and "display[ing] a high degree of competence." PA 86-87, 90, 92, 94-95.

conclusion that Motley's injuries necessarily prevented him from fulfilling the essential functions of a police officer with or without an accommodation. Reading the facts in the record in the light most favorable to Motley, as we must, the record suggests the opposite.

The majority explains that his applications for benefits were bereft of any indication that he could perform the essential functions of his job, and were more than a blanket statement of "total disability" because they were supported by a description of his injuries. This is misleading. His amended application, admittedly filed after his original application was approved,[7] clearly states: "Since the event, I have been on light duty." *See* SA 12. Furthermore, the majority does not consider that the benefit application asks for a description of his injuries, which he gave, noting that the experiences caused pain. Lastly, the majority misreads the findings of the medical board.[8]

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7. Motley first filed for benefits in April 1993. By letter dated February 3, 1994, he was informed that his application was approved. In his first application, Motley answered "No" to the question: "Have you performed regular duty since the traumatic event?" *See* SA 14. In his amended application, filed on March 15, 1994, six weeks after his original application was granted and six weeks before he first received benefits, Motley answered the same question by writing that he had "been on light duty" since the event. *See* SA 12. In his reply brief, the Appellant states that the new application was filed because Motley realized the first application was not completely accurate. Appellee's brief does not discuss the amended application.

8. The majority asserts: "Neither Motley nor the State Police contested [the medical board's] finding which presumably took the

(Cont'd)

(Cont'd)
fundamental job requirements for state police officers, along with reasonable accommodations such as light duty, into consideration when it chose to grant Motley full pension benefits." This presumption is unfounded, and the majority provides no authority for its conclusion. The conclusion is tantamount to determining that no statutory explanation is possible in this case.

Furthermore, comparison between N.J. Stat. Ann. 53:5A-10(a) — applicable here — and 53:5A-9(a) suggests that the majority's broad reading of the medical board's findings is not supportable. Section 53:5A-9(a), which deals with general disabilities rather than those arising from an event occurring during performance of police duties, requires that the: "medical board . . . certify that such member is mentally or physically incapacitated for the performance of his usual duty and *of any other available duty* in the Division of State Police which the Superintendent of State Police is willing to assign him." N.J. Stat. Ann. § 53:5A-9(a) (West 1999) (emphasis added). This additional phrase, "of any other available duty", not contained in 53:5A-10(a), may be important to our understanding of 53:5A-10)(a). The New Jersey Superior Court has interpreted 53:5A-9(a) to require the determination of whether there are assignments that the plaintiff could perform which "could reasonably made available to him," *Crain v. State of New Jersey*, 584 A.2d 863, 868 (N.J. Super. Ct. 1991), before requiring benefits under that section, and an Administrative Law Judge has suggested that the reasonable accommodation standard of the ADA provided the best analogy to the standard announced in *Crain*. *See Ward v. Board of Trustees of the Police and Firemen's Retirement Sys.*, 1999 WL 160596 (N.J. Admin. Feb. 10, 1999) (publication page reference not available). The section that applies here has no corresponding language, and should not be read to support the presumption that accommodation entered into the medical board's thinking, let alone its finding.

Appendix A

It is worth remembering that Motley did not retire from the police department solely because his pain made working difficult. He retired after he became frustrated with the police force's refusal to consider him for promotion to Detective I. Due to the medical status he was assigned, Motley was not permitted to take the police force's physical exam. He therefore effectively became ineligible for promotion although he worked at such a high level and received glowing reviews, and even though police internal operating procedures held open the possibility that the eligibility of temporarily disabled individuals would be considered by the Superintendent on a case-by-case basis. *See* S.O.P. C-20(H)(2)(a). Motley did not suffer his frustration in silence. He filed a grievance in August 1991 complaining of his denial of promotion because of the physical exam, and submitted a request for a case-by-case determination by the Superintendent in November 1993 before resigning effective May 1994.

Accordingly, I would remand to the District Court for reconsideration of the grant of summary judgment in light of *Cleveland*.

A True Copy:
Teste:

Clerk of the United States Court of Appeals for the Third Circuit

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 97-5715

DANIEL C. MOTLEY,

Appellant

v.

NEW JERSEY STATE POLICE;
THE STATE TROOPERS FRATERNAL
ASSOCIATION OF NEW JERSEY

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF NEW JERSEY

(D.C. No. 96-cv-00419)
District Judge: Honorable Dickinson R. Debevoise

ARGUED BY COUNSEL
August 3, 1998

Present: Nygaard, Alito and Rendell, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel August 3, 1998.

Appendix A

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered September 11, 1997, be, and the same is hereby affirmed. Costs taxed against the appellant. All of the above in accordance with the opinion of this Court.

ATTEST:

s/ P. Douglas Sisk
Clerk

Dated: November 1, 1999

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY DATED SEPTEMBER 9, 1997 AND FILED SEPTEMBER 10, 1997

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civ. No. 96-419 (DRD)

DANIEL C. MOTLEY,

Plaintiff,

v.

THE NEW JERSEY STATE POLICE and THE STATE TROOPERS FRATERNAL ASSOCIATION OF NEW JERSEY,

Defendants.

OPINION

* * *

DEBEVOISE, Senior District Judge.

Plaintiff, Daniel C. Motley, a former New Jersey State Trooper, asserts claims against defendants under the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12111(8), 12112(a), the New Jersey Law Against Discrimination, *N.J.S.A.* 10:5-1 *et seq.*, for breach of the statutory duty of fair representation and the covenant to deal

fairly and in good faith and for violation of public policy. Defendant New Jersey State Police ("NJSP") moves for summary judgment pursuant to **Fed. R. Civ. P.** 56(c). Defendant State Troopers Fraternal Association of New Jersey ("STFA") also moves for summary judgment. For the reasons set forth below, the motions for summary judgment will be granted.

BACKGROUND

Daniel C. Motley became a member of the NJSP as a State Trooper on February 11, 1982.[1] In or about February 1982, Mr. Motley also joined the STFA, which is the recognized employee representative for New Jersey State Troopers. The STFA is certified by the New Jersey Public Employment Relations Commission ("PERC") to represent employees respecting the terms and conditions of their employment.

Since August 1988, the NJSP has required all members to participate in an annual physical examination pursuant to Standard Operating Procedure ("SOP") C-20. Each member is required annually to (i) run 1.5 miles in thirteen minutes; (ii) do thirty-four sit-ups in two minutes; (iii) do thirty-two push-ups in two minutes; and (iv) be assessed for flexibility. Alternative tests involving swimming and cycling are available for members with medical conditions preventing them from participating in the run. SOP C-20 prevents any

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1. The following facts are compiled from the statements provided by the parties pursuant to Local Civil Rule 56.1 and are undisputed unless otherwise indicated.

trooper who fails to pass the annual physical examination from meeting the eligibility standards for promotion.

On July 1, 1989, Mr. Motley was promoted to the rank of Detective II. On January 24, 1990, he suffered injuries to his left eye, back, shoulder, neck and knees while acting in an undercover capacity during a drug buy-bust operation. As a result of his injuries, on February 9, 1990 a NJSP physician put Mr. Motley on Temporary Limited On Duty status. Accordingly, he was not permitted to participate in the annual physical examination. However, he was kept on full duty status and kept his vehicle.

In August 1991, Mr. Motley believed that he was entitled to a tenured promotion to Detective I because he had the requisite service time. However, he was not recommended for the promotion. His performance evaluation indicated that this was because he did not participate in the annual physical examination. His performance evaluation also indicated that eligibility for promotion was to be considered on a case by case basis by the Superintendent at the time that a vacancy was announced.

On August 28, 1991, Mr. Motley filed a timely grievance to the denial of the promotion. He claims that when he asked about the grievance he was told that "these things take time," or that he would "have to wait." STFA asserts that grievances to the various provisions of SOP C-20, including the grievance filed by Mr. Motley, were processed through the initial phases and then were held in abeyance pending the completion of the arbitration of the first six grievances filed. Due to this fact, the STFA reached an agreement with the

State Police Labor Relations Unit of the Office of Employee Relations, representing the NJSP, to waive the time limits for demanding arbitration on these grievances.

On April 7, 1993, Mr. Motley submitted a signed and sworn application for an accidental disability pension. The application was filed with the State Police Retirement System, New Jersey Division of Pensions. In this application, he described his injuries as follows:

> Since my accident I have had extremely painful and recurring headaches. I also have intense back pain whenever I sit for prolonged periods (i.e. 20 minutes or more). I have difficulty sleeping at night and wake up almost every 2-3 hours because of pain in my lower back. Before I start my day I must taken [sic] an extremely long and hot shower to loosen the spasms in my back. Finally, I have extreme pain in my left knee. I cannot stand on it without pain and I have extreme difficulty with running.

STFA Exhibit K. In addition, he declared that he is "permanently and totally disabled as a direct result of a traumatic event" which occurred during the performance of his regular or assigned duties at 8:00 P.M. on January 24, 1990. *Id.* Mr. Motley answered "No" in response to the question: "Have you performed regular duty since the traumatic event?" *Id.*

On May 4, 1993, Mr. Motley filed a second grievance in which he grieved the failure of his first grievance to progress. Mr. Motley's second grievance was dismissed in

June 1993. On November 9, 1993, Mr. Motley submitted a "Request for Determination" to then NJSP Superintendent Justin J. Dintino as to why he was denied a tenured promotion to Detective I. The NJSP responded to the request for determination on December 8, 1993 by stating it was NJSP policy not to provide written data regarding the inquiry.

Meanwhile, Mr. Motley's application for an accidental disability pension was progressing. On May 6, 1993, Mr. Dintino signed an "Employer Certification" regarding the application for an accidental disability pension. On December 4, 1993, the medical board submitted a report signed by Dr. William Coleman confirming that Mr. Motley was permanently and totally incapacitated for State Police Officer duties. Mr. Motley's application for accidental disability retirement was granted by the Division of Pensions on February 3, 1994, effective May 1, 1993.

On March 15, 1994, Mr. Motley submitted an amended application for the accidental disability pension. In the amended application, he indicated that he received "severe injuries to [his] knees, back and neck." STFA Exhibit L. He once again declared that he is totally and permanently disabled as a result of the events which occurred on January 24, 1990 and declared that he has been on light duty since the event.

On April 26, 1994, Mr. Motley submitted his letter of resignation from the NJSP. His resignation was effective as of May 1, 1994. He has been receiving disability payments on a monthly basis since his resignation.

Appendix B

On August 11, 1995, the State of New Jersey filed a Petition for Scope of Negotiations Determination with PERC. STFA Exhibit A. The Petition sought a determination that the authority to determine criteria for promotion, among other things, is not arbitrable and there is no basis for an arbitrator to order recision of SOP C-20 or retroactive promotions to members denied promotions by application of SOP C-20. Mr. Motley's name was included in a list of parties to SOP C-20 grievances attached to the Petition. STFA opposed this Petition. However, on January 19, 1996 PERC held, among other things, that the Superintendent has a non negotiable prerogative to require troopers to pass the annual physical examination. STFA Exhibit F. It also held that SOP C-20 sanctions, including ineligibility for promotion, are non negotiable. *Id.* This effectively denied the first grievance filed by Mr. Motley.

SUMMARY JUDGMENT STANDARDS

Summary judgment is appropriate where the moving party establishes that "there is no genuine issue as to any material fact and that [it] is entitled to a judgment as a matter of law." **Fed. R. Civ. P.** 56(c). The moving party must show that if the evidentiary material of record were reduced to admissible evidence in court, it would be insufficient to permit the non-moving party to carry its burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

Once the moving party has carried its burden under Rule 56, "its opponent must do more than simply show that there is some metaphysical doubt as to the material facts in question." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*,

475 U.S. 574, 586-87 (1986), *rev'g*, 723 F.2d 238 (3d Cir. 1983). The opposing party must set forth specific facts showing a genuine issue for trial and may not rest upon the mere allegations or denials of its pleadings. *Sound Ship Bldg. Corp. v. Bethlehem Steel Co.*, 533 F.2d 96, 99 (3d Cir.), *cert. denied*, 429 U.S. 860 (1976).

At the summary judgment stage the court's function is not to weigh the evidence and determine the truth of the matter, but rather to determine whether there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). The mere existence of some alleged factual dispute between the parties, however, will not defeat an otherwise properly supported motion for summary judgment. *Id.* at 247-248.

ANALYSIS

The NJSP and the STFA move for summary judgment dismissing the complaint against them in its entirety. The complaint consists of four counts: count one — violations of the ADA and NJLAD; count two — breach of fiduciary duty, which has been characterized by all parties as breach of the statutory duty of fair representation under the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151 *et seq.*; count three — breach of the covenant to deal fairly and in good faith; and count four — violation of public policy. Count one is asserted against the NJSP and counts two, three and four are asserted against both the NJSP and the STFA.

Count one of the complaint sets forth a claim against the NJSP for violations of the ADA and the NJLAD. The

defendants assert that this count must be dismissed on the basis of judicial estoppel. The equitable doctrine of judicial estoppel may be invoked in the discretion of the court "to preserve the integrity of the judicial system by preventing parties from playing fast and loose with the courts in assuming inconsistent positions." *McNemar v. Disney Store, Inc.*, 91 F.3d 610, 617 (3d Cir. 1996), *cert. denied*, __ U.S. __, 117 S. Ct. 958, 136 L. Ed. 2d 845 (1997). A two part threshold inquiry is necessary in determining whether to apply judicial estoppel: "(i) Is the party's present position inconsistent with a position formerly asserted? (2) If so, did the party assert either or both of the inconsistent positions in bad faith — *i.e.*, 'with intent to play fast and loose' with the court?" *Id.* at 618 (quoting *Ryan Operations G.P. v. Santiam-Midwest Lumber Co.*, 81 F.3d 355, 361 (3d Cir. 1996)). Thus, application of judicial estoppel is highly dependent upon the facts and circumstances of each individual case. *Id.* at 217.

In this case, Mr. Motley certified in his applications for accidental disability retirement of April 7, 1993 and March 15, 1994 that he is permanently and totally disabled as a result of the events of January 24, 1990. However, for purposes of his ADA claim, he must demonstrate that he is a qualified person with a disability "who, with or without reasonable accommodation, can perform the essential functions of the employment position" for purposes of the ADA claim. 42 U.S.C. §§ 12111(8), 12112(a). In addition, he cannot maintain his NJLAD claim if "the nature and extent of the handicap reasonably precludes the performance of the particular employment." *N.J.S.A.* 10:5-4.1.

Appendix B

Mr. Motley's assertions of permanent and total disability and inability to work are fundamentally inconsistent with his current position that at all material times with or without accommodation he was able to perform the essential functions of his position. Counsel for Mr. Motley noted both in the papers submitted and at oral argument on September 8, 1997 that he never specifically claimed to be disabled in August 1991 when he was to be considered for a promotion. However, his declaration that he is totally and permanently disabled includes the August 1991 time period. In addition, he certified that he has not performed regular duty since the traumatic event. Accordingly, because Mr. Motley has asserted fundamentally inconsistent positions, the first part of the test for judicial estoppel is met.

In addition, it is apparent that the reason for Mr. Motley's assertion of inconsistent positions is to gain an advantage. He claimed total disability and received an accidental disability pension. He asserts that at that same time he was able to perform the essential functions of his job. Accordingly, Mr. Motley has played "fast and loose" with the court, and the second part of the test for judicial estoppel is met.

Although it initially may seem unfair to force individuals to choose between seeking disability benefits and suing under the ADA and NJLAD, "there is no indication that either the United States Congress or the New Jersey legislature intended to provide disability benefits to persons capable of obtaining gainful employment." *McNemar*, 91 F.3d at 620. Accordingly, the NJSP will be granted summary judgment on the ADA and NJLAD claims set forth in count one of the complaint on the basis of judicial estoppel.

Appendix B

Count two of the complaint sets forth a claim for breach of the statutory duty of fair representation. Although this claim is technically directed to both the NJSP and the STFA, the only material allegations are against the STFA. Because no allegations against the NJSP are set forth in count two of the complaint, it will be dismissed against the NJSP.

The STFA first asserts that count two of the complaint must be dismissed against it because it characterizes this case as a hybrid case. A hybrid case is one in which an employee files a claim against the employer for breach of the collective bargaining agreement under section 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a) and files a claim against the union for breach of the duty of fair representation. *Felice v. Sever*, 985 F.2d 1221, 1226 (3d Cir. 1993), *cert. denied*, 509 U.S. 923 (1993). In a hybrid case, if the plaintiff cannot prove that employer breached the collective bargaining agreement, there can be no recovery against the union on the claim for breach of the duty of fair representation because the claims are "inextricably interdependent." *Id.* However, a plaintiff who has a viable hybrid case "may opt to bring only the section 301 claim against the employer or the breach of duty of fair representation claim against the union." *Id.*

The STFA asserts that the claim against it for breach of the duty of fair representation cannot be maintained if the claim against the NJSP under the ADA is dismissed. However, this case is not a hybrid case as discussed in *Felice*. *See id.* Mr. Motley has not asserted a claim against the NJSP for breach of the collective bargaining agreement. Mr. Motley's claims against the NJSP for violations of the ADA

and the NJLAD are not inextricably interdependent with his claim against the STFA for breach of the duty of fair representation. Accordingly, the fact that the NJSP was granted summary judgment on the claims for violation of the ADA and the NJLAD has no effect on the maintenance of the claim against the STFA for breach of the duty of fair representation.

The STFA also asserts that Mr. Motley has not asserted facts sufficient to support a claim for breach of the duty of fair representation. "A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory or in bad faith." *Vaca v. Sipes*, 386 U.S. 171, 190 (1967). In the context of grievance procedures, the union will be liable for breach of the duty of fair representation if it arbitrarily ignores a meritorious grievance or processes it in "perfunctory fashion." *Riley v. Letter Carriers Local No. 380*, 668 F.2d 224, 228 (3d Cir. 1981). In order to maintain such a claim a party must do more than demonstrate negligence, as "a showing of actual bad faith or arbitrary conduct" is required. *Id.*

The undisputed facts of this case demonstrate that STFA processed Mr. Motley's grievance along with other similar grievances which were stayed pending the arbitration of the first six grievances filed regarding SOP C-20. The grievance was included by the State in its Petition for Scope of Negotiations Determination, which was opposed by the STFA, and was effectively denied by PERC in January 1996. Mr. Motley has asserted no facts which demonstrate that his grievance was arbitrarily ignored or that the STFA acted in bad faith.

Appendix B

Mr. Motley has presented evidence that he was not fully informed regarding the progress of his grievance. However, this is not sufficient to demonstrate the bad faith or arbitrary conduct necessary to maintain a claim for breach of the duty of fair representation. Accordingly, the STFA will be granted summary judgment on the allegations of count two of the complaint.

Count three of the complaint asserts that the NJSP and the STFA have breached a covenant to deal fairly and in good faith, and count four asserts that they have violated public policy. The facts asserted by Mr. Motley in this case are simply insufficient to demonstrate that the NJSP or the STFA treated him unfairly or acted recklessly or in bad faith. In fact, the undisputed material facts demonstrate that Mr. Motley's grievance against the NJSP was processed appropriately by the STFA. Accordingly, the NJSP and the STFA will be granted summary judgment on the allegations of counts three and four of the complaint.

CONCLUSION

For the reasons set forth above, the motions for summary judgment of the NJSP and the STFA are granted. The complaint will be dismissed in its entirety with prejudice. An appropriate order follows.

s/ Dickinson R. Debevoise
Dickinson R. Debevoise,
U.S.S.D.J.

Dated: September 9, 1997

Appendix B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civ. No. 96-419 (DRD)

DANIEL C. MOTLEY,

Plaintiff,

v.

THE NEW JERSEY STATE POLICE and
THE STATE TROOPERS FRATERNAL
ASSOCIATION OF NEW JERSEY,

Defendants.

ORDER

This matter having been opened to the Court by Peter Verniero, Esq., Attorney General of New Jersey, attorney for defendant New Jersey State Police, on a motion for summary judgment, and by Leon B. Savetsky, Esq., Loccke & Correia, P.A., attorneys for defendant State Troopers Fraternal Association of New Jersey, on a motion for summary judgment, in the presence of Julian Wilsey, Esq., Vinick & Docherty, Esqs., attorneys for plaintiff Daniel C. Motley, and notice having been given to all parties, in consideration of the papers submitted, for good cause shown, and for the reasons set forth in the Court's opinion of even date,

Appendix B

IT IS, on this 9th day of September 1997,

ORDERED that the motion for summary judgment of defendant New Jersey State Police is granted; and it is further

ORDERED that the motion for summary judgment of defendant State Troopers Fraternal Association of New Jersey is granted; and it is further

ORDERED that the complaint is dismissed in its entirety with prejudice.

s/ Dickinson R. Debevoise
Dickinson R. Debevoise,
U.S.S.D.J.

APPENDIX C — PHYSICAL FITNESS PROGRAM OF THE NEW JERSEY STATE POLICE DATED AUGUST 24, 1988 AND REVISED OCTOBER 7 AND 14, 1988

S.O.P.

August 24, 1988 C20

SUBJECT
PHYSICAL FITNESS PROGRAM

REFERENCE
S.O.P. C7, C50
N.J.S.A. 53:1-10 et seq.
N.J.S.P. Rules & Regulations

RESCINDS
S.O.P. C20, dated 3/10/88

O.P.I. NUMBER
K030

I. *AUTHORITY*:

A. Pursuant to authority vested in the Superintendent by *N.J.S.A.* 53:1-10 et seq., and in accordance with Article V., Section 3 of the New Jersey State Police Rules and Regulations, "A member shall keep physically fit and be subject to duty at all times . . .", a physical fitness program is hereby established within the Division of State Police.

Appendix C

II. *INTRODUCTION*:

A. Members of the New Jersey State Police have an individual and organizational responsibility to be physically fit. A member's duties are physically demanding and serious in consequence. At any time, without warning, members may become involved in a violent confrontation. If our members are unable to respond with appropriate strength and force, the individual member or the public may suffer injury or death.

B. Of the values we adhere to, that of personal responsibility demands we develop and maintain habits and lifestyles for ourselves and other members of the Division which are suited to meeting the rigors of our profession. Proper exercise and diet very directly affect our professional competence.

III. *MECHANICS*:

A. All sworn members on Full Duty Status shall participate in the Division's Physical Fitness Test in accordance with procedures outlined herein.

1. Sworn members on Temporary Limited On Duty Status may, based upon the recommendation of the organizational physician and with the approval of the Superintendent, participate in the physical fitness test.

Appendix C

2. Personnel should maintain individual physical fitness.

B. Responsibility for Administering the Physical Fitness Program

1. The Division Staff Section Supervisor shall be responsible for implementing and coordinating the Physical Fitness Program. He shall:

a. Select a location for testing.

b. Assign a sufficient number of qualified personnel to conduct the testing.

c. Obtain the necessary equipment (ensuring its accuracy and reliability) for testing.

d. Schedule all medically/physically qualified members for physical fitness testing.

e. Report to the Deputy Superintendent, those members who are not medically/physically fit, failed or did not participate in physical fitness testing.

f. Conduct the required testing and promptly report the results to the Deputy Superintendent and other personnel indicated in this order.

g. Schedule re-tests when necessary.

h. Record all testing results on the "New Jersey State Police Physical Testing File" (S.P. 59).

(1) See Annex A.

i. Establish other initiatives, when necessary, to achieve the intent of this order.

C. The Physical Fitness Program shall consist of:

1. 1.5 mile timed run

a. All participating members must complete this cardiovascular endurance test within 13 minutes.

b. Two alternative tests for measuring an equivalent level of cardiovascular endurance are authorized for those individuals who have a medically documented condition which prevents them from participating in the 1.5 mile run. This alternate testing is temporary and is only intended for use by Division members when they are unable to participate in the 1.5 mile run because they are recovering from an illness or injury.

(1) Alternative #1 — 550 yard swim in 12 minutes.

(2) Alternative #2 — Pedaling an approved stationary bicycle for a sufficient period of time to measure the established V02 max standard.

c. In addition, all members satisfactorily completing either alternative test will be required to demonstrate their mobility by completing a 40 yard run.

d. Application to participate in either of the alternative testing procedures must be submitted on a special report, with accompanying medical documentation, to the Personnel Bureau Chief, via channels, for review and evaluation.

e. Application must be made on a yearly basis prior to the Fall Physical Test.

2. Timed pushups

a. All members must complete 32 repetitions of this muscular strength and endurance exercise within two minutes.

(1) Pushups shall be done in the following manner:

(a) Extend arms and place hands on ground just under and slightly outside of the shoulders, fingers pointing forward.

(b) Extend body so that it is perfectly straight; weight is supported on hands and toes.

(c) Keeping body straight, bend elbows and touch chest to floor and return to original position (body must be straight, buttocks must not raise, and abdomen must not sag).

3. Timed situps

a. All members must complete 34 repetitions of this muscular strength and endurance exercise within two minutes.

(1) Situps shall be done in either manner listed below:

(a) Lie on back, knees bent, feet held by a partner (or otherwise appropriately secured), fingers laced behind head. Curl torso to upright position, touching elbows to knees and return to starting position.

(b) Lie on back, knees bent, feet held by a partner (or otherwise appropriately secured), arms bent at the elbow with forearms in a crisscross manner across the chest.

Appendix C

Curl torso to upright position, touching elbows to thighs and return to starting position.

4. Flexibility Assessment (Trunk Flexion Test)

   a. Seated on the floor with the soles of the feet against a box with legs straight and knees locked. A yardstick is placed on the box with a 15 inch mark at the front edge of the box. Member slowly reaches forward with both hands even. The best of three efforts is recorded.

      NOTE: Members should stretch while waiting to be tested.

5. Body Weight/Composition Assessment

   a. All members shall have their weight measured and recorded:

      (1) During the medical examination (Well Trooper Program).

         (a) The Medical Unit shall refer overweight members, via channels, to the In-Service Unit for an official weight assessment.

      (2) During the annual physical fitness program and retests.

(3) When ordered by their Section Supervisor.

b. All members whose weight exceeds acceptable standards as illustrated in the "Height/Weight Screening Table" (See Annex B) shall have their body composition measured and recorded.

(1) 20% body fat is the acceptable maximum for male members.

(2) 26% body fat is the acceptable maximum for female members.

NOTE: Members who exceed the maximum body composition percentage, will not be allowed to participate in the physical test and shall be re-tested in accordance with Paragraph III. F. 1. a., "Physical Fitness Re-testing Procedures".

D. Physical Fitness Acknowledgement

1. Prior to testing, all members shall sign an acknowledgement included in the "New Jersey State Police Physical Testing File" (S.P. 59), stating that there are no known medical or other conditions which would prevent them from being tested.

Appendix C

a. See Annex A, "New Jersey State Police Physical Testing File" (S.P. 59).

2. Members who are unable to be tested because of a medical and/or physical ailment, shall complete and sign a "Non-Participant Acknowledgement" (S.P. 60). Member will be required to follow the procedure in Paragraph III. G. 1.

a. See Annex C, "New Jersey State Police Physical Fitness Examination Non-Participant Acknowledgement" (S.P. 60).

NOTE: The Procedures set forth in Paragraph III. G. 2., of this directive shall apply to those members who are unable to be tested.

E. Physical Fitness Test Results

1. To satisfactorily complete the Physical Fitness Test, members must achieve the required standard in the following testing phases: 1.5 mile run or approved alternative, pushps, situps, and body weight/composition.

2. In the event of failure, the Division Staff Section Supervisor shall promptly notify the failing member's Section Supervisor.

a. The reason for failure shall be stated.

Appendix C

3. Failing members assigned to a Section at Division Headquarters shall be promptly counseled after each physical fitness test or re-test by the Section Supervisor or his designee; Troop personnel shall be promptly counseled by either their Troop Commander or a troop staff officer.

    a. Counseling shall be documented on a Personnel Performance Notice (S.P. 205).

    b. Failing members may be referred to a Division Physician for medical evaluation.

F. Physical Fitness Re-testing Procedures

1. The Division Staff Section Supervisor or his designee shall:

    a. Schedule and re-test failing members as necessary at three months intervals after the regularly scheduled physical fitness test.

    b. Schedule and test those members who were unable to participate in the regular annual physical fitness program.

G. Medical/Physical Conditions which prevent a member's participation in the Physical Fitness Program.

Appendix C

1. Members who have a medical or physical condition which will prevent them from participating in a physical fitness test shall complete a "Non-Participant Acknowledgement Form" (SP 60), Annex C. These members shall forward a written report, via channels, to the Administration Section Supervisor, outlining the pertinent facts.

    a. This report shall include all available medical documentation.

    b. The report shall be completed and forwarded as soon as the member is aware that he/she will not be able to participate in the physical fitness test.

    c. If a member is unable to complete and forward the "Non-Participant Acknowledgement Form" prior to the scheduled physical fitness test, the form shall be completed on the day of the test. Any available medical documentation is to be forwarded to the Administration Section Supervisor within five (5) days of the test date.

2. Upon receipt of a member's Non-Participant Acknowledgement Form and report, the Administration Section Supervisor shall refer the member and these reports to a Division Physician.

Appendix C

3. The Physician shall return all documentation with his medical evaluation of the member's condition and recommendation as to the member's ability to perform the Physical Fitness Test to the Administration Section Supervisor.

4. The Administration Section Supervisor shall review the medical reports and physician's recommendation.

   a. If the Division physician and the Administration Section Supervisor determine that the member is able to participate in the physical fitness test, the member shall be rescheduled to attend a re-test.

   b. If the Division physician and the Administration Section Supervisor determine that the member is unable to participate in the physical fitness test, the Administration Section Supervisor shall forward all documentation to the Chairman (Deputy Superintendent) of the Duty Status Review Board.

      (1) The board, after examining the facts shall evaluate the member's fitness for continued employment in the Division of State Police and submit appropriate recommendations to the Superintendent.

Appendix C

H. Sanctions

1. Any member who is not in compliance with the body weight/composition standards, as outlined in Paragraph III C. 5., shall be ineligible for promotion and may be refused re-enlistment by the Superintendent if tenure has not been attained.

2. Any member, in compliance with the body weight/composition standards, who does not satisfactorily complete any portion of the Physical Fitness Test as outlined in Paragraph III. C.1., 2., and 3., shall be subject to the following actions:

   a. A member shall not be eligible for promotion.

      Exception:

      A sworn member who does not satisfactorily complete any portion of the physical fitness test due to a *temporary* medical or physiological problem will not be automatically excluded from the promotional process. Promotional eligibility for such members will be determined by the Superintendent on a case-by-case basis.

   b. A member who has not attained tenure may be refused re-enlistment by the Superintendent.

Appendix C

3. In addition, any member who fails or does not participate in two consecutive scheduled physical fitness tests may be excluded from applying for specialist selection.

4. In addition to the preceding sanctions, the Superintendent may impose discipline as set forth in Article I, Section 1 of the New Jersey State Police Rules and Regulations.

IV. Nothing in this order shall preclude the Superintendent from exercising his authority as set forth in *N.J.S.A.* 53:1-5.2.

V. In accordance with S.O.P. A1, "Orders", the Division Staff Section Supervisor shall notify the Planning Bureau Chief, via channels, of any changes that are necessary in this order.

BY ORDER OF THE SUPERINTENDENT

s/ Joseph A. Flynn
Joseph A. Flynn, Lt. Colonel
Deputy Superintendent

APPENDIX D — APPLICATION FOR ACCIDENTAL DISABILITY RETIREMENT DATED APRIL 7, 1993

STATE POLICE RETIREMENT SYSTEM —
NEW JERSEY DIVISION OF PENSIONS
APPLICATION FOR ACCIDENTAL
DISABILITY RETIREMENT

PLEASE READ THE ACCOMPANYING INSTRUCTIONS. IF THERE ARE NO INSTRUCTIONS WITH THE APPLICATION PLEASE CONTACT THE DIVISION OF PENSIONS.

PART ONE: (Please print or type.)

1. Name Motley Daniel Clark

2. Address: 150 Pine Street
-Montclair New Jersey 07042

3. Name of Employer: New Jersey State Police

4. County: Mercer

5. Title or Position: State Trooper — Trooper II

6. Membership #: 3655 #2735

7. Social Security #: 137-48-4805

8. Date of Birth: 12/26/58

9. Home Phone #: (201) 234-2887

10. Business Phone #: (201) 881-1226

Appendix D

PART TWO: Please read the accompanying instructions before completing this section.

11. Retirement benefits to be effective the first day of May, 1993.

12. Has a claim been filed for Workers' Compensation?
☒ Yes ☐ No

a. Amount of Periodic Benefit $ N/A per week.

b. Beginning date of award N/A

c. Ending date of award N/A

Are you currently under departmental charges or formal indictment? ☐ Yes ☒ No

PART THREE: This item, required by the Federal Internal Revenue Service, applies only to those who were active, contributing members before and after July 1, 1986. If this applies, you have the option of having your exclusion amount calculated using both the old annuity tables and the new unisex tables, of the IRS. Using the new unisex tables only, usually produces a higher taxable amount. Please read the choices below and check the appropriate box. THIS CHOICE IS IRREVOCABLE AND APPLIES TO THE YEAR MADE AND ALL SUBSEQUENT YEARS. IF NO BOX IS CHECKED

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THE DIVISION IS OBLIGATED TO USE THE NEW UNISEX TABLES ONLY.

☒ Use both old IRS annuity tables and new unisex tables.

* * *

PART FOUR: (Please print or type.) Please provide the requested information regarding your marital status and children. If Part Four is completed, please submit your marriage certificate plus the birth certificates or adoption papers of all eligible children.

14. MARITAL STATUS: . . . ☒ Married

* * *

15. NAME OF SPOUSE (if married):
Motley Lisbeth Ann (Ellersick) [Maiden Name]

16. SPOUSE'S SOCIAL SECURITY #: 136-56-9733

17. BIRTHDATE: 1/21/58

18. LIST ANY CHILDREN UNDER 18 YEARS OF AGE. BE SURE TO INDICATE BOTH THE SEX AND BIRTHDATE OF EACH CHILD.

N/A

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PART FIVE: APPLICANT'S STATEMENT SUPPORTING CLAIM FOR DISABILITY RETIREMENT

19. I declare that I am permanently and totally disabled as a direct result of a traumatic event occurring during and as a result of the performance of my regular or assigned duties at @8:00 p.m. on 1/24/90 at Lackawana Plaza, Montclair, New Jersey.

20. State the symptoms of your disability (in your own words): See Attached Rider

21. Describe the traumatic event *(accident)* in detail. See Attached Rider.

22. Periods of hospitalization arising from traumatic event. January 24, 1990; Emergency Room – Mountainside Hospital

23. Have you performed regular duty since the traumatic event? No

PART SIX: DESIGNATION OF BENEFICIARY — This section is to be used to name a beneficiary(ies) for your group life insurance. Please be sure to name both a Primary and Contingent beneficiary.

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Primary Beneficiary(ies)

Full Name of Beneficiary	**Relationship**	**Address**	**Birthdate**
Lisbeth Ann Motley	Wife	150 Pine Street, Montclair	1/21/58

* * *

I authorize any physician, hospital, clinic or rehabilitation facility who has treated or examined me or who may do so in the future to furnish the Division of Pensions with a full report regarding my physical condition. In addition to the records which I am required to forward to the Division of Pensions, I authorize the Division of Pensions to obtain copies of all hospital records and reports. If the Board of Trustees finds that I do not meet the requirements for an Accidental Disability, I understand that I will be retired on an Ordinary Disability Retirement, provided I meet the requirements.

SIGNATURE OF APPLICANT s/ Daniel C. Motley
Daniel C. Motley

State of New Jersey

County of Morris

Sworn to and subscribed before me this 7th day of April, 1993.

Signature of Notary or
Commissioner of Deeds s/ Olympia Melvin

Appendix D

APPLICATION OF DANIEL MOTLEY FOR ACCIDENTAL DISABILITY RETIREMENT

RIDER

Part Five: **APPLICANT'S STATEMENT SUPPORTING CLAIM FOR DISABILITY RETIREMENT**

20. *State the symptoms of your disability (in your own words)*

Since my accident I have had extremely painful and recurring headaches. I also have intense back pain whenever I sit for prolonged periods (i.e. 20 minutes or more). I have difficulty sleeping at night and wake up almost every 2-3 hours because of pain in my lower back. Before I start my day I must taken an extremely long and hot shower to loosen the spasms in my back. Finally, I have extreme pain in my left knee. I cannot stand on it without pain and I have extreme difficulty with running.

21. *Describe the traumatic event (accident) in detail.*

On January 24, 1990 I was involved in a buy/bust operation. The target was named Michael Gianetta. As I tried to arrest Mr. Gianetta he tried to escape in his vehicle. We struggled over a bag of cocaine and Mr. Gianetta held my arm on the steering wheel as we struggled over the gear shift. Mr. Gianetta managed to get the car in reverse and I was carried approximately 150 feet while holding onto the steering wheel.

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The backward momentum drove the side view mirror into my back. After this, Gianetta crashed into a street light. With this, I was thrown forward and hit my left eye against the driver's side door post. I was also thrown approximately 10-12 feet in the air and landed directly on my knees.

s/ Daniel C. Motley
DANIEL C. MOTLEY

Sworn to and Subscribed
to before me on this
7th day of April, 1993

s/ Olympia Melvin
OLYMPIA MELVIN
A Notary Public of New Jersey
My Commission Expires February 6, 1996

APPENDIX E — APPLICATION FOR ACCIDENTAL DISABILITY RETIREMENT DATED MARCH 15, 1994

STATE POLICE RETIREMENT SYSTEM — NEW JERSEY DIVISION OF PENSIONS APPLICATION FOR ACCIDENTAL DISABILITY RETIREMENT

PLEASE READ THE ACCOMPANYING INSTRUCTIONS. IF THERE ARE NO INSTRUCTIONS WITH THE APPLICATION PLEASE CONTACT THE DIVISION OF PENSIONS.

PART ONE: (Please print or type.)

1. Name Motley, Daniel Clark

2. Address: 150 Pine Street
   Montclair, N.J. 07042

3. Name of Employer: New Jersey State Police

4. County: Passaic

5. Title or Position: Detective II

6. Membership #: 2735

7. Social Security #: 137-48-4805

8. Date of Birth: 12/26/58

9. Home Phone #: (201) 234-2887

10. Business Phone #: (201) 881-1226

Appendix E

PART TWO: Please read the accompanying instructions before completing this section.

11. Retirement benefits to be effective the first day of May 1, 1994.

12. Has a claim been filed for Workers' Compensation?

☒ Yes ☐ No

* * *

Workers Comp Award of $10,000.00 in 1993. Same paid in one check.

Are you currently under departmental charges or formal indictment? ☐ Yes ☒ No

PART THREE: This item, required by the Federal Internal Revenue Service, applies only to those who were active, contributing members before and after July 1, 1986. If this applies, you have the option of having your exclusion amount calculated using both the old annuity tables and the new unisex tables, of the IRS. Using the new unisex tables only, usually produces a higher taxable amount. Please read the choices below and check the appropriate box. THIS CHOICE IS IRREVOCABLE AND APPLIES TO THE YEAR MADE AND ALL SUBSEQUENT YEARS. IF NO BOX IS CHECKED THE DIVISION IS OBLIGATED TO USE THE NEW UNISEX TABLES ONLY.

☒ Use both old IRS annuity tables and new unisex tables.

* * *

Appendix E

PART FOUR: (Please print or type.) Please provide the requested information regarding your marital status and children. If Part Four is completed, please submit your marriage certificate plus the birth certificates or adoption papers of all eligible children.

14. MARITAL STATUS: . . . ☒ Married

* * *

15. NAME OF SPOUSE (if married):
Motley, Daniel Clark (Ellersick) [Maiden Name]

16. SPOUSE'S SOCIAL SECURITY #: 136-56-9733

17. BIRTHDATE: 1/21/58

18. LIST ANY CHILDREN UNDER 18 YEARS OF AGE. BE SURE TO INDICATE BOTH THE SEX AND BIRTHDATE OF EACH CHILD.

None

PART FIVE: APPLICANT'S STATEMENT SUPPORTING CLAIM FOR DISABILITY RETIREMENT

19. I declare that I am permanently and totally disabled as a direct result of a traumatic event occurring during and as a result of the performance of my regular or assigned duties at @8:00 pm on 1/24/90 at the Lackawana Plaza, Montclair, NJ.

Appendix E

20. State the symptoms of your disability (in your own words): I have received severe injuries to my knees, back and neck.

21. Describe the traumatic event *(accident)* in detail. While on duty, in an undercover capacity, I was involved in a buy/bust drug operation. The suspect dragged me along the outside of his vehicle until we hit a telephone utility pole.

22. Periods of hospitalization arising from traumatic event. The night of the incident.

23. Have you performed regular duty since the traumatic event? Since the event I have been on light duty.

PART SIX: DESIGNATION OF BENEFICIARY — This section is to be used to name a beneficiary(ies) for your group life insurance. Please be sure to name both a Primary and Contingent beneficiary.

Primary Beneficiary(ies)

Full Name of Beneficiary	**Relationship**	**Address**	**Birthdate**
Lisbeth Motley	— Spouse —	150 Pine Street, Montclair, NJ	1/21/58

* * *

Appendix E

I authorize any physician, hospital, clinic or rehabilitation facility who has treated or examined me or who may do so in the future to furnish the Division of Pensions with a full report regarding my physical condition. In addition to the records which I am required to forward to the Division of Pensions, I authorize the Division of Pensions to obtain copies of all hospital records and reports. If the Board of Trustees finds that I do not meet the requirements for an Accidental Disability, I understand that I will be retired on an Ordinary Disability Retirement, provided I meet the requirements.

SIGNATURE OF APPLICANT s/ Daniel C. Motley

State of New Jersey

County of Passaic

Sworn to and subscribed before me this 15th day of March, 1994.

Signature of Notary or
Commissioner of Deeds s/ [illegible]